No. 99

FILED
JUL 16 19

Supreme Court of the United States

OCTOBER TERM, 1948

MATTIE McELROY,
Petitioner,

VERSUS

W. M. PEOG ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

BRIEF OF RESPONDENTS IN OPPOSITION

JEFF BUSBY,
Washington Loan & Trust Building,
Washington, D. C.,
Counsel for Respondents.

Of Counsel:
OREL BUSBY,
L. H. HARRELL,
A. W. TRICE,
C. L. McARTHUR,
HOBERT G. ORTON,
THOMAS P. HOLT,
WARREN B. KICE,
VERNON ROBERTS,
Attorney and Guardian ad litem for Mark Tatum, Jr., a minor,
Ada, Oklahoma.

July, 1948.

STEINBACK TYPESETTING CO., 13 SOUTH WALKER, OKLAHOMA CITY 4, OKLAHOMA

INDEX

PAGE

SUBJECT INDEX

Opinions Below 1

Question Presented 1

Statement 1

Argument and Authorities 4

Conclusion 18

AUTHORITIES

CASES:

Anchor Oil Co. v. Gray, 256 U. S. 519, 60 L. Ed. 1070 ..... 4, 16

Bradley v. Richmond, 227 U. S. 477, 33 Sup. Ct. 318, 57 L. Ed. 603 5

Canfield v. Jack, 78 Okla. 121, 188 Pac. 1040 11

Chicago, R. I. & P. R. Co. v. Austin, 63 Okla. 169, 163 Pac. 517, L. R. A. 1917D, 666 7

Clark v. Strong, 105 App. Div. 179, 93 N. Y. Supp. 514 10

Collins v. Collins (Ariz.), 52 Pac. (2d) 1169, 1174 .. 10

Copeland v. Johnson et al., 101 Okla. 228, 224 Pac. 986 9

Davis v. Robedaux, 97 Okla. 86, 222 Pac. 990 10

Davis v. Travis, 175 Okla. 21, 52 Pac. (2d) 72 10

Felix v. Patrick, 135 U. S. 317, 12 Sup. Ct. 852, 36 L. Ed. 719 10

Frazier v. Goddard, 63 Fed. Supp. 698 ..... 4, 18

Gilbert v. Gaines, 169 Okla. 5, 35 Pac. (2d) 911 ..... 4, 17

Goddard v. Frazier, 156 Fed. (2d) 938-941 (certiorari denied October 28, 1946, 329 U. S. 765 .. 3, 4, 6, 18

Graham v. LaCrosse, 102 U. S. 148, 26 L. Ed. 106 .. 10

INDEX CONTINUED

PAGE

Jones v. Merfeldt, 167 Okla. 520, 30 Pac. (2d) 924 ..4, 16

Lamotte v. United States, 254 U. S. 570, 41 Sup. Ct. 204, 65 L. Ed. 410 10

Lone Wolfe v. Hitchcock, 187 U. S. 553, 23 Sup. Ct. 216, 47 L. Ed. 6

Lykins v. McGrath, 184 U. S. 169, 22 Sup. Ct. 450, 46 L. Ed. 485 .....4, 6, 14-15, 16

Mattingly v. District of Columbia, 97 U. S. 687, 24 L. Ed. 1098 7

McFaddin v. Evans-Snider-Buel Co., 185 U. S. 505, 22 Sup. Ct. 758, 46 L. Ed. 1021 7

Murrow Indian Orphans' Home v. McClendon, 64 Okla. 205, 166 Pac. 1101 12

Pickering v. Lomax, 145 U. S. 310, 12 Sup. Ct. 860, 36 L. Ed. 716 .....6, 16

Pluto Oil & Gas Co. v. Miller, 95 Okla. 222, 219 Pac. 303 10

Scioto Oil Co. v. O'Hern, 67 Okla. 106, 169 Pac. 483 4, 16

Shonk v. Brown, 61 Pac. 320 12

Smeltzer v. St. Louis & S. F. R. Co. (C. C. Ark.), 158 Fed. 649 5

Stamm v. Bostwick, 40 Hun. N. Y. 93 10

Stephens v. Cherokee Nation, 174 U. S. 445, 19 Sup. Ct. 722, 43 L. Ed. 1041 6

Tiger v. Western Investment Co., 221 U. S. 286, 31 Sup. Ct. 578, 55 L. Ed. 738 6

United States v. Heinszen & Co., 206 U. S. 370, 387, 27 Sup. Ct. 742, 51 L. Ed. 1098, 11 Ann. Cas. 688 .. 7

United States v. Hellard, 322 U. S. 363, 64 Sup. Ct. 985, 88 L. Ed. 1326 6

INDEX CONTINUED

PAGE

United States v. Sandoval, 231 U. S. 28, 34 Sup. Ct. 1, 58 L. Ed. 107 6
U. S. v. Williams, 139 Fed. (2d) 83 ..... 5, 8

Winton v. Amos, 255 U. S. 373, 41 Sup. Ct. 342, 65 L. Ed. 684 6

Young, Ex Parte, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764 5

STATUTES:

Act of July 2, 1945, 59 Stat. 313 (Public Law 116, 79th Congress) 1, 5, 8-9

MISCELLANEOUS:

23 Am. & Eng. Enc. of Law (2d Ed.), Sec. 464 10

Cooley on Constitutional Limitations, 8th Ed., p. 776 6-7
40 Cyc. 1995 10

Sutherland Statutory Construction, 3rd Ed., Sec. 2206 6

No. 99

Supreme Court of the United States

OCTOBER TERM, 1948

MATTIE MCELROY,
Petitioner,

VERSUS

W. M. PEGG ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

BRIEF OF RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The District Court did not write an opinion. Its findings of fact, conclusions of law, and its judgment appear in the record at pages 75-77, 77-79, and 79-82, respectively. The opinion of the Circuit Court of Appeals (R. 341-348) is reported at 167 Fed. (2d) 668.

QUESTION PRESENTED

Whether the Act of July 2, 1945, 59 Stat. 313 (Public Law 116, 79th Congress), is constitutional.

STATEMENT

Petitioner McElroy, in the trial court and in the Circuit Court of Appeals, sought to recover land on a number of grounds involving both facts and law.

Among the fact questions urged was inadequacy of consideration and the overreaching of Lucy Harjo in her deed to Pegg. The learned trial judge held that there was no fraud perpetrated upon Harjo, that there was no inadequacy of consideration. The Circuit Court affirmed the findings of the trial court, and observed that while McElroy took as a devisee under the will of Harjo as an instrument of conveyance and not by descent as an heir, she was in no sense an innocent purchaser for value; that she paid no value. The Appellate Court further observed that McElroy knew the deed from Harjo to Pegg had not been approved by the Secretary of the Interior; that she accepted from Pegg a conveyance of a portion of the land included in the deed from Harjo to Pegg; and that McElroy merely succeeded to Harjo's rights which were subject to being cut off by the approval of the deed by the Secretary of the Interior, or by congressional enactment rendering such approval unnecessary.

The pleadings (R. 250) and the evidence (R. 119-120) show that McElroy signed her mother's (Harjo's) name to the deed she seeks to cancel, participated in the original transaction and procured title to a portion of the land from Pegg (R. 260 and 317) and (R. 120). Hence it should be noted from the outset that equity and justice in this case are on the side of the respondents.

Neither the trial court nor the Circuit Court deemed it necessary to discuss or refer to those defenses interposed by the respondents against the petitioner as to laches, estoppel, failure to make restoration, or the applicable statutes of limitation. Both courts were content to settle the issues in favor of the respondents on the facts, the legal interpretation of the applicable Federal statute and the interpretations thereof by the Federal courts. Both courts held that the Act of July 2, 1945, Public Law 116, the Federal statute involved in the case at bar is constitutional.

We wish to emphasize the reasoning of the courts as set out in the case of *Goddard* v. *Frazier*, 156 Fed. (2d) 938-941 (*certiorari* denied October 28, 1946, 329 U. S. 765), involving Public Law 116, which is the curative act in question here. It was there observed that courts do not regard rights as constitutionally protected which are contrary to the equity and justice of the case; that when the intent of a curative act is to achieve a result which will be recognized in a court of equity, a greater presumption of validity attaches to it and it should be liberally construed to effectuate the salutary purpose. As found by the trial and appellate courts, equity in the case at bar was on the side of the respondents.

It should also be noted that the United States was brought into this case in the trial court by the petitioner, but that the United States did not join in the appeal to the Circuit Court after an adverse decision to petitioner. Nor has the United States joined in this application for Writ of Certiorari. This indicates that the attorneys for the United States Government, who are zealous in their

defense of property rights of Indians where either the facts or legal decisions involve such rights, are not concerning themselves with the results and interpretations of the trial and appellate courts in the case at bar.

ARGUMENT AND AUTHORITIES

The correct rules of law on the questions raised and argued by petitioner can be stated as follows:

(a) The Act of July 2, 1945, Public Law 116, is constitutional. *Frazier* v. *Goddard*, 63 Fed. Supp. 698; *Goddard* v. *Frazier*, 156 Fed. (2d) 938. (*Certiorari* denied, October 28, 1946, 329 U. S. 765).

(b) The deed from Lucy Harjo to W. M. Pegg, dated November 17, 1932, could have been approved, and thereby validated, by the Secretary of Interior at any time, either before or after the death of Lucy Harjo. *Lykins* v. *McGrath*, 184 U. S. 169, 22 Sup. Ct. 450, 46 L. Ed. 485; *Anchor Oil Co.* v. *Gray*, 256 U. S. 519, 60 L. Ed. 1070; *Jones* v. *Merfeldt*, 167 Okla. 520, 30 Pac. (2d) 924; *Scioto Oil Co.* v. *O'Hern*, 67 Okla. 106, 169 Pac. 483; *Gilbert* v. *Gaines*, 169 Okla. 5, 35 Pac. (2d) 911.

(c) Congress could have authorized Lucy Harjo and Indians of her class to convey the land involved and other lands so acquired, with the approval of the Secretary of Interior or of any other governmental agency. Or, Congress could have omitted or refrained from placing any restrictions on such land. Or, could have omitted to extend restrictions on such land beyond April 26, 1931. In fact practically the entire membership of the Oklahoma Bar familiar with Indian litigation believed for many years that Congress had omitted to extend such restrictions under the 1928 Act

until the case of *U. S.* v. *Williams*, 139 Fed. (2d) 83, was decided by the United States Circuit Court for the Tenth Circuit. It was after this decision that Congress passed the curative act in question known as Public Law 116 or the Curative Act of July 2, 1945 (50 U. S. Stat. 313).

It follows that Congress had the power to validate the deeds of Lucy Harjo and others in the same situation, without the approval of the Secretary of Interior, and the Act of July 2, 1945, was not in violation of the Fifth Amendment to the Constitution. *Frazier* v. *Goddard, supra; Goddard* v. *Frazier, supra.*

In *Frazier* v. *Goddard, supra*, the trial court had under consideration Section 3 of the Act, *supra*. Sections 1, 2 and 3, however, from a legal standpoint all fall in the same category. Each section is a curative act as to a separate question affecting Indian land titles in Oklahoma. If one section is invalid, all are invalid; and the converse is, of course, true, *i. e.*, if one section is valid all three are valid.

The trial court in *Frazier* v. *Goddard, supra*, pointed out that the sole question to determine was whether or not the Act of Congress involved was valid or constitutional. The presumption, of course, is that all acts are constitutional, and a heavy burden is upon him who asserts unconstitutionality. *Bradley* v. *Richmond*, 227 U. S. 477, 33 Sup. Ct. 318, 57 L. Ed. 603; *Ex parte Young*, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764; *Smeltzer* v. *St. Louis & S. F. R. Co.* (C. C. Ark.), 158 Fed. 649. The trial court referred to this Act as "Public Law 116," that it was an act to validate titles to certain lands conveyed to Indians of the Five Civilized Tribes and held that it was constitutional. The trial court

specifically pointed out that in passing Public Law 116 Congress was operating in a field wherein it had plenary power; that it was operating in a field in which Congress was supreme. *Brader* v. *James,* 246 U. S. 88, 38 Sup. Ct. 285, 62 L. Ed. 591; *Tiger* v. *Western Investment Co.,* 221 U. S. 286, 31 Sup. Ct. 578, 55 L. Ed. 738; *Winton* v. *Amos,* 255 U. S. 373, 41 Sup. Ct. 342, 65 L. Ed. 684; *United States* v. *Sandoval,* 231 U. S. 28, 34 Sup. Ct. 1, 58 L. Ed. 107; *Stephens* v. *Cherokee Nation,* 174 U. S. 445, 19 Sup. Ct. 722, 43 L. Ed. 1041; *Lone Wolfe* v. *Hitchcock,* 187 U. S. 553, 23 Sup. Ct. 216, 47 L. Ed.; *United States* v. *Hellard,* 322 U. S. 363, 64 Sup. Ct. 985, 88 L. Ed. 1326. The trial court then stated (page 699): "My conclusion is that Public Law No. 116 is constitutional."

In the same opinion (page 700) an analysis and application is made of the cases of *Pickering* v. *Lomax,* 145 U. S. 310, 12 Sup. Ct. 860, 36 L. Ed. 716, and *Lykins* v. *McGrath,* 184 U. S. 169, 22 Sup. Ct. 450, 46 L. Ed. 485. Petitioner refers to and criticizes both of these cases in her petition for Writ of Certiorari. These cases are wholly contrary to the contentions of the petitioner.

Frazier v. *Goddard, supra,* was appealed to the United States Circuit Court of Appeals, Tenth Circuit, and affirmed on July 10, 1946, as *Goddard* v. *Frazier,* 156 Fed. (2d) 938. The Appellate Court (page 941) discussed the test for determining the validity of curative statutes and referred to the established rule that "a Legislature may validate by subsequent act anything it might have authorized previously or may make immaterial anything it might have omitted in the original act." Sutherland Statutory Construction, 3rd Ed., Sec. 2206; Cooley on Constitutional Limi-

tations, 8th Ed., p. 776; *Mattingly* v. *District of Columbia*, 97 U. S. 687, 24 L. Ed. 1098; *McFaddin* v. *Evans-Snider-Buel Co.*, 185 U. S. 505, 22 Sup. Ct. 758, 46 L. Ed. 1012; *United States* v. *Heinszen & Co.*, 206 U. S. 370, 387, 27 Sup. Ct. 742, 51 L. Ed. 1098, 11 Ann. Cas. 688; *Chicago, R. I. & P. R. Co.* v. *Austin*, 63 Okla. 169, 163 Pac. 517, L. R. A. 1917D, 666.

A petition for Writ of Certiorari was filed in the Supreme Court of the United States after the *Goddard* v. *Frazier* decision, *supra*, became final and the writ was denied on October 28, 1946, 329 U. S. 765.

It will thus be seen that a United States District Court for this district has determined that Public Law 116, or the Act of July 2, 1945, is constitutional; the United States Circuit Court for the Tenth Circuit affirmed this decision; and this Court denied Writ of Certiorari. Therefore, the legal question involved herein, to-wit, the constitutionality of Public Law 116, or the Curative Act of July 2, 1945, has been fully and finally determined and there is no substance to this appeal.

Further answering petitioner's contentions we desire to point out that the restriction on Lucy Harjo against the alienation of the particular land involved rests primarily upon the restriction in the deed of October 20, 1919, from N. B. Haney, Jr., and wife to Harjo (R. 244-245). That restriction in substance is as follows:

> "That any deed to this land 'executed during the lifetime of such grantee at any time prior to April 26, 1931, shall be of no force and effect or capable of confirmation or ratification unless made with the consent of and approval by the Secretary of the Interior."

Pegg obtained his deed from Harjo on November 17, 1932 (R. 249, 250).

In the case of *United States* v. *Williams, supra* (December 13, 1943), it was determined by the United States Circuit Court of Appeals for the Tenth Circuit that Congress had (1) the power to impose the restrictions on alienation of lands by full blood Indians for a certain period of time, and (2) the power to extend the period of restriction against alienation, and (3) that the Act of 1928 extended such restrictions for an additional 25 years from April 26, 1931. The *Williams* case thus held that this extension would apply to the Harjo land in question.

Under the reasoning of the courts in *Frazier* v. *Goddard* and *Goddard* v. *Frazier, supra,* and in the decision herein sought to be appealed from, Congress had the power to validate any deeds made without the approval of any governmental agency as provided by former Acts. Section 1 of the Act of July 2, 1945 (Public Law 116) is as follows:

> "That no conveyance made by an Indian of the Five Civilized Tribes on or after April 26, 1931, and prior to the date of the enactment of this Act, of lands purchased, prior to April 26, 1931, for the use and benefit of such Indian with funds derived from the sale of, or as income from, restricted allotted lands and conveyed to him by deed containing restrictions on alienation without the consent and approval of the Secretary of the Interior prior to April 26, 1931, shall be invalid because such conveyance was made without the consent and approval of the Secretary of the Interior: PROVIDED, That all such conveyances made after the date of the enactment of this Act must have the consent and approval of the Secretary of the In-

terior: Provided Further, That if any such conveyances are subject to attack upon grounds other than the insufficiency of approval or lack of approval such conveyances shall not be affected by this section."

Thus, by the passage of the Act of July 2, 1945, Congress validated the deed from Harjo to Pegg.

The two decisions in the *Frazier-Goddard* cases nullify the argument of petitioner at pages 21 and 22 of her petition and brief, to the effect that the deed from Lucy Harjo to Pegg was void and not subject to confirmation for the reasons (1) that the approval by the Secretary was necessary in advance of Harjo's execution of this deed, and (2) that the restrictions could only be removed on the application of Harjo.

Petitioner urges, however, that particular circumstances place her in a position to which this rule of law would not apply. This for the reason that petitioner acquired whatever interest she might have in this land as residuary devisee prior to the passage of the validating act, that she thereby acquired a title which Congress could not take away from her.

Petitioner wholly overlooks the fact that she acquired whatever interest she might have in these lands as the residuary devisee of Harjo. Since the consideration for a residuary devise under a will is love and affection, petitioner is not in the realm of a bona fide purchaser for value or of an innocent purchaser for value. In *Copeland* v. *Johnson et al.*, 101 Okla. 228, 224 Pac. 986, the Court laid down the rule that a full blood Indian devisee takes under a will as an instrument of conveyance and not by descent as an heir.

Lamotte v. *United States*, 254 U. S. 570, 41 Sup. Ct. 204, 65 L. Ed. 410; *Stamm* v. *Bostwick*, 40 Hun. N. Y. 93; *Clark* v. *Strong*, 105 App. Div. 179, 93 N. Y. Supp. 514; 40 Cyc. 1995; 23 Am. & Eng. Enc. of Law (2d Ed.), Sec. 464.

Petitioner further overlooks the fact that she could not acquire any greater interest as a residuary devisee than that owned by Lucy Harjo at the time of her death. *Collins* v. *Collins* (Ariz.), 52 Pac. (2d) 1169, 1174.

Since petitioner takes from Harjo, if at all, as a purchaser, the general rule with reference to her right to attack a prior deed executed by Harjo on the same property is laid down by this Court in *Graham* v. *LaCrosse*, 102 U. S. 148, 26 L. Ed. 106. There the Court held that even though a deed was obtained from the grantor by fraudulent representations, it was not void but voidable only at the election of the grantor; that a subsequent purchaser from the grantor could not allege fraud of the first grantee to defeat the deed; that the right to attack the deed on the ground of fraud is not a right capable of sale and transfer; that such right is a mere personal right. The rule was stated in *Pluto Oil & Gas Co.* v. *Miller*, 95 Okla. 222, 219 Pac. 303, that where a party has waived or omitted to exercise the right to institute proceedings to recover lands of which he has been defrauded, such right does not inure to the benefit of subsequent creditors or purchasers. *Davis* v. *Robedaux*, 97 Okla. 86, 222 Pac. 990; *Davis* v. *Travis*, 175 Okla. 21, 52 Pac. (2d) 72.

Petitioner cites the case of *Felix* v. *Patrick*, 135 U. S. 317, 12 Sup. Ct. 852, 36 L. Ed. 719, but that case is not applicable to the fact situation here. There the Court found

that the title under which Patrick claimed had been obtained by various instruments which were fraudulent devices to evade the law and therefore expressed the opinion that if the action had been timely brought, the claimants of the original patentee could have recovered. In the case at bar the trial court has held that there was no fraud in obtaining the deed under which respondents claim, and the Circuit Court has affirmed the trial court's findings. This makes our case entirely different from *Felix* v. *Patrick, supra.* In that case, however, the United States Supreme Court sustained the title of Patrick upon the ground of laches and want of equity as the Sioux Indians claimants to the land had sat idly by for many years, as petitioner had in the case at bar, and had allowed innocent purchasers to acquire title to the land and make large expenditures thereon without any warning of the claims of those Indian heirs. The same character of laches and want of equity exists in the case at bar.

The case of *Canfield* v. *Jack,* 78 Okla. 121, 188 Pac. 1040, relied on by appellant, is not applicable to the facts in this case. There the first party who took a deed from Indian heirs delayed having the deed approved until after a second party had also taken a deed from the Indian heirs and had the same approved. We readily concede that the rule is firmly established in this jurisdiction that where two or more deeds are given by restricted Indians, the first deed to be approved by the proper approving agency becomes validated to the exclusion of the various other deeds given either before or after the approval deed.

In this case Harjo had given no second deed. Petitioner claims under the residuary clause contained in Harjo's will

executed on April 4, 1938. Harjo did not mention in her will the land involved in this action and by the residuary clause did not indicate any intent to convey this land. She did specifically devise the land she had acquired in the trade with Pegg. This indicated clearly that Harjo considered that she had parted with the title to the land sought to be recovered by petitioner. Petitioner as the residuary devisee does not stand in the position of an innocent purchaser for value, such as would have been the case of the holder under a second deed properly approved.

The case of *Shonk* v. *Brown*, 61 Pac. 320, cited by petitioner is not in the least applicable to the facts in this case. There the property was devised to a married woman by a will with absolute restrictions upon her alienation of the same during her lifetime. The legislative branch of the government did not and could not place that restriction on her alienation of the land. That restriction could only be placed thereon by the testator. Consequently, it follows that the legislative body could not validate her conveyance or remove the restriction against such a conveyance in violation of the terms of the devise in the will.

Petitioner relies heavily upon the case of *Murrow Indian Orphans' Home* v. *McClendon*, 64 Okla. 205, 166 Pac. 1101. In that case the Oklahoma Supreme Court was dealing with a restriction wholly different from the restriction involved in this case. Whether the Court was right, or not, it held that the Act of April 21, 1904, controlled in that case and that Act did not provide for the approval of deeds as does the applicable restriction in the case at bar. That Act provided only for removal of restrictions by the Sec-

retary of Interior upon recommendation of the Indian Agent. There the Court pointed out that the Secretary of the Interior under that Act had no power to approve a deed, but only the power to approve the recommendation of the Indian Agent that the restrictions be removed; that the Secretary's approval of a deed was entirely unauthorized and added no vitality whatever to the instrument.

The restriction in this case is a restriction of an entirely different character and the necessary approval by the Secretary of Interior is a consent to conveyance. The case here is controlled by the rule laid down by the Supreme Court of the United States in *Lykins* v. *McGrath*, *supra*. That case involved land patented to David Lykins, a member of the Peoria Tribe of Indians. The restriction contained in the patent was as follows: "That said tract shall never be sold or conveyed by the grantee or his heirs without the consent of the Secretary of the Interior for the time being." Lykins executed a deed to the land and died before the approval thereof by the Secretary. He left two heirs who brought suit in ejectment to recover possession of the land from the person in possession under said deed. The heirs made exactly the same contention there that petitioner makes in this case. They contended that the deed from Lykins not having been approved before his death became thereby an absolute nullity; that title to the land immediately vested in them free from any claim of the grantee to the land; that they never asked for approval by the Secretary, never consented that it should be given, never in any way ratified or acceded to the deed of their ancestor, and that the Secretary was without any authority after the death of the patentee to approve said deed.

In that case the Supreme Court discussed the case of *Pickering* v. *Lomax, supra.* In the *Pickering* case it was held that the final approval of a deed by the President some thirteen years after it was given related back to the date of the deed. Applying this holding to the *Lykins* case, *supra,* the Court stated: "It must therefore be considered as settled that the consent of the Secretary of the Interior to a conveyance by one holding under a patent like the present may be given after the execution of the deed, and when given is retroactive in its effect and relates back to the date of the conveyance."

Petitioner's contention as to any special right of petitioner in this case is completely answered by the United States Supreme Court in *Lykins* v. *McGrath, supra.* We quote from that opinion as the reasoning therein set out applies with greater force to the facts in this case than any argument we could make:

> "Counsel for plaintiff in error would liken this deed to a power of attorney,—a mere authority to convey, which loses its vitality at the death of the grantor of the power. It seems to us more like a deed fully executed and placed in escrow, to be finally delivered on the performance of a condition. While ordinarily in case of an escrow title passes at the date of the second delivery, yet often, for the prevention of injustice, the deed will relate back to the first delivery so as to pass title at that time * * * .
>
> "The plaintiffs have no equities superior to those of the purchaser. They are the heirs of the Indian grantor, and as such may rightfully claim to inherit and be secured in the possession of all that property to which he had at his death the full equitable title; but when, as is shown by the approval of the Secretary, he had received full payment of a stipulated

price, and that price was ample, and he had been subjected to no imposition or wrong in making the conveyance, then their claims as heirs cannot be compared in equity with those of the one who had thus bought and paid full value. They certainly do not stand in the attitude of bona fide purchasers. 'A person who is a mere volunteer, having acquired title by gift, inheritance, or some kindred mode, cannot come within the scope of the term bona fide purchaser * * * '."

The last proviso of Section 1 of the 1945 Act provides; "That if any such conveyances are subject to attack upon grounds other than the insufficiency of approval or lack of approval such conveyances shall not be affected by this section." Congress thereby left open to the heirs and devisees of Lucy Harjo any defense of fraud or of lack of consideration of any other defense which they might have other than insufficiency of approval or lack of approval by the Secretary of Interior. If petitioner had any defense to said deed by reason of fraud or failure of consideration, it was saved to her by this proviso and she has in the trial court and the Circuit Court litigated all such questions as she contends may apply. By the phrase "subject to attack upon (other) grounds," the Act means subject to a valid attack only. Certainly it does not mean a frivolous, unfounded, unsound or unmaintainable attack which anyone might make upon a conveyance. The trial court has held on ample evidence and a complete hearing that there was no fraud by Pegg in obtaining the deed from Harjo and that there was an adequate consideration for the deed. The Circuit Court of Appeals has affirmed the decision of the trial court. This brings the case at bar squarely within the reasoning of this Supreme Court in *Lykins* v. *McGrath*, *supra*.

Counsel for petitioner discuss the case of *Pickering* v. *Lomax, supra,* but have rather studiously avoided any attempt to distinguish the case of *Lykins* v. *McGrath, supra.* The language of the Supreme Court in the latter case quoted above very conclusively answers every argument of petitioner in her attempt to distinguish the case of *Pickering* v. *Lomax, supra.*

Another case in point is *Anchor Oil Co.* v. *Gray, supra.* This case involves the construction of Section 2 of the Act of May 27, 1908, which so far as applicable is as follows: "That leases of restricted lands for oil, gas or other mineral purposes, * * * may be made with the approval of the Secretary of the Interior under the rules and regulations provided by the Secretary of the Interior and not otherwise." It appears in that case that a lease was given by the Creek full blood allottee. Before the lease was approved by the Secretary of Interior the allottee died. Her heirs attempted to give a lease to other parties which lease was approved by the County Court having jurisdiction of the allottee's estate. Subsequently the Secretary of Interior approved the original lease executed by the allottee. The United States Supreme Court in that opinion held that the validity of the lease made by the allottee having been conditioned upon the approval of the secretary, such approval might be given at any time, either before or after her death, so far as the rights of her heirs, and the rights of those claiming under them with notice, were concerned, and that the approval, when given, related back and took effect as of the execution of the lease. That case cited and approved the earlier case of *Scioto Oil Co.* v. *O'Hern, supra.*

In *Jones* v. *Merfeldt, supra,* it appears that Jones, a full blood Cherokee Indian, had inherited land from his son, that he attempted to convey the same without approval by the County Court. The deed was placed of record and Jones thereafter died without the deed being approved. His heirs commenced a suit against the grantee in the deed to recover the lands. After the suit was started the grantee went into the proper county court and had the deed approved. The Oklahoma Supreme Court held the approval good, that it related back to the date of the deed, and was effective to cut out the heirs of Jones. The Court pointed out that deeds by full blood Indians conveying lands inherited from the allottee may be approved by the County Court at any time, before or after the death of the grantor, and when so approved, the deed becomes effective so as to cut out heirs of the grantor and in favor of the grantee. This case was followed by the Oklahoma Supreme Court in *Gilbert* v. *Gaines, supra.*

The decisions are conclusive on the proposition that the deed from Harjo to Pegg could have been approved by the Secretary of Interior at any time prior to the death of Harjo; that the petitioner, McElroy, could acquire no greater interest than Harjo had at the time of her death, therefore the deed from Harjo could have been approved by the Secretary at any time after Harjo's death; that petitioner is not in any sense a bona fide purchaser for value without notice of said deed, that she acquired no vested right or interest as against Pegg and his grantees which could not be completely cut off by the subsequent approval of the deed by the Secretary of the Interior.

It necessarily follows, under the holding and reasoning of the trial court and the Circuit Court of Appeals in *Frazier* v. *Goddard, supra,* and *Goddard* v. *Frazier, supra,* that if the Secretary of Interior could approve the deed from Harjo to Pegg after the death of Harjo, then Congress of the United States could validate such deed by dispensing with the necessity of such approval. This was fully within the power of Congress, and Congress did so validate this deed by Section 1 of the Act of July 2, 1945, Public Law 116, 79th Congress, U. S. Stat. 313.

CONCLUSION

The decision of the Circuit Court of Appeals is plainly correct and presents no conflict of decisions. Therefore, it is respectfully submitted that the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JEFF BUSBY,
Washington Loan & Trust Building,
Washington, D. C.,
Counsel for Respondents.

Of Counsel:
OREL BUSBY,
L. H. HARRELL,
A. W. TRICE,
C. L. MCARTHUR,
HOBERT G. ORTON,
THOMAS P. HOLT,
WARREN B. KICE,
VERNON ROBERTS,
Attorney and Guardian ad litem for
Mark Tatum, Jr., a minor,
Ada, Oklahoma.
July, 1948.